Asociacion de Empleados del Estado Libre Asociado de Puerto Rico *and* Union Internacional de Trabajadores de la Industria de Automoviles, Aeroespacio e Implementos Agricolas, U.A.W., Local 1850. Cases 12–CA–218502 and 12–CA–232704

January 14, 2021

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS EMANUEL AND MCFERRAN

On November 6, 2019, Administrative Law Judge Sharon Levinson Steckler issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

Under the law of the Commonwealth of Puerto Rico, employers with more than 20 employees generally must pay a Christmas bonus. The law provides for a bonus amount of up to $600, but unionized employers can agree to pay more. The most recent collective-bargaining agreement between the Respondent and the Charging Party Union ("the CBA" or "the 2013–2017 agreement") was effective from July 1, 2013, through June 30, 2017, and was extended through January 31, 2019, except for a hiatus period from November 1, 2017, through December 20, 2017. The CBA granted bonuses as provided in Puerto Rico's Christmas-bonus law "with the following modification," and the "modification" consisted of bonus amounts greater than the legally required $600 in 2013, 2014, 2015, and 2016.

This case presents two issues. First, did the Respondent unilaterally change unit employees' terms and conditions of employment in violation of Section 8(a)(5) of the Act when, during the hiatus period in December 2017, it paid unit employees Christmas bonuses of $600? Second, did the Respondent modify the CBA, in violation of Section 8(a)(5) within the meaning of Section 8(d), when it paid unit employees Christmas bonuses of $600 in December 2018? For the reasons explained below, we find that the Respondent acted lawfully on both occasions. Accordingly, we will dismiss the complaint.

I. BACKGROUND[1]

The Respondent is a Puerto Rico corporation with an office in San Juan. The Union has represented a unit of the Respondent's employees since 1992. Puerto Rico Law No. 148 of June 30, 1969, as amended, P.R. Laws Ann. title 29, Section 501 et seq. ("Law No. 148") mandates the annual payment of Christmas bonuses to employees of regulated entities. Under the law, employers with more than 20 employees—like the Respondent—are generally obligated to pay their employees a bonus of up to $600. Law No. 148 at Section 501. The bonus is to be paid annually between November 15 and December 15. Id. at Section 502. Law No. 148 does "not apply in cases where the workers or employees receive an annual bonus by collective agreement," unless the collectively bargained bonus amount is less than employees would have received under the statute. Id. at Section 506.

Prior to their most recent agreement, the parties reached collective-bargaining agreements effective May 24, 2002, to July 31, 2005; February 1, 2006, to July 31, 2009; and December 1, 2009, to July 1, 2013. Article 41 of each agreement obligated the Respondent to award a Christmas bonus "as provided in [Law No. 148]" with one or more modifications. The 2002–2005 agreement provided for payment of bonuses according to a single formula "during the term of this agreement"; subsequent contracts provided for bonus payments according to different formulas in different, specified years, but always with bonuses "as provided in [Law No. 148]" as the contractual baseline. The parties stipulated that the Respondent annually paid the bonus according to the terms of the agreements. The record does not show how the parties dealt with Christmas bonuses during the hiatus period from August 1, 2005, to January 31, 2006, during which the 2005 Christmas bonus would have been paid. It also does not show whether any of these agreements were extended.

Article 41 of the 2013–2017 agreement provided in its entirety as follows.

> [The Respondent] will grant the Christmas Bonus as provided in [Law No. 148] with the following modification:
>
> [8.60 percent] of the salaries earned up to a maximum of $37,000 in 2013.
> [8.60 percent] of the salaries earned up to a maximum of $38,000 in 2014.
> [8.65 percent] of the salaries earned up to a maximum of $39,000 in 2015.

[1] The parties submitted this case to the judge on a stipulated record.

> [8.65 percent] of the salaries earned up to a maximum of $40,000 in 2016.
>
> Salaries to be considered shall be the ones earned between October 1st of the previous year and September 30th of the year corresponding to the bonus.

The Respondent paid employees the greater-than-statutory bonus amounts specified in the 2013–2017 agreement in 2013, 2014, 2015, and 2016.

The parties began bargaining for a new agreement around the time the 2013–2017 agreement was set to expire. As negotiations continued, the parties agreed to extend the CBA several times: from June 30 to October 31, 2017; from December 21, 2017, to August 31, 2018; and from September 8, 2018, to January 31, 2019. In December 2017, during a hiatus period when no agreement was in effect, the Union requested that the Respondent pay Christmas bonuses according to the highest level provided for in the 2013–2017 agreement: the 2016 amount of 8.65 percent of each employee's salary up to $40,000. The Respondent refused and paid bonuses "as provided in [Law No. 148]," i.e., $600. In December 2018, with an extension agreement in effect, the Union made the same request, and the Respondent again paid each employee a $600 bonus.

II. DISCUSSION

The General Counsel alleges that the Respondent unilaterally changed the status quo in 2017 in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act), and modified the extended 2013–2017 agreement in 2018 in violation of Section 8(a)(5) and (1) of the Act within the meaning of Section 8(d). The judge found the violations as alleged, and the Respondent excepts. In support of the judge's decision, the General Counsel cites the Respondent's practice of paying greater-than-statutory Christmas bonuses under the terms of past collective-bargaining agreements. In opposition, the Respondent argues that the 2013–2017 agreement provided for "modification[s]" to the statutory bonus amount in 4 specific years—2013, 2014, 2015, and 2016—and otherwise provided for statutory bonus amounts, and that the statutory amount was the status quo in December 2017 and the contractual amount in 2018.

We agree with the Respondent's argument. Accordingly, we reverse.

A. The Unilateral-Change Allegation

After a collective-bargaining agreement expires, an employer has a statutory duty to maintain the status quo on mandatory subjects of bargaining until the parties reach a new agreement or a valid impasse in negotiations. See *Triple A Fire Protection*, 315 NLRB 409, 414 (1994), enfd. 136 F.3d 727 (11th Cir. 1998), cert. denied 525 U.S. 1067 (1999).[2] The substantive terms of the expired agreement generally determine the status quo. See *PG Publishing Co., Inc. d/b/a Pittsburgh Post-Gazette*, 368 NLRB No. 41, slip op. at 3 (2019); *Hinson v. NLRB*, 428 F.2d 133, 139 (8th Cir. 1970). The Board may also consider any extracontractual past practices that are "regular and long-standing, rather than random or intermittent." *Sunoco, Inc.*, 349 NLRB 240, 244 (2007).

Because the substantive terms of the expired agreement generally determine the postexpiration status quo, our analysis is governed by the relevant provision of the 2013–2017 agreement. Article 41 of that agreement states that "[the Respondent] will grant the Christmas Bonus as provided in [Law No. 148] with . . . modification[s]" in 4 specific years: 2013, 2014, 2015, and 2016. The judge found that the reference to Law No. 148 in the 2013–2017 agreement had no effect on the Respondent's obligations under the agreement because Section 506 of Law No. 148 states that it "shall not apply in cases where the workers or employees receive an annual bonus by collective agreement." But nothing in Law No. 148 precludes an employer and a union from negotiating a collective-bargaining agreement that makes the statutory bonus amount the contractual amount. That is what the plain language of Article 41 provides. The "Christmas Bonus as provided in [Law No. 148]" refers to the statutory bonus of Section 501. The Section 501 bonus amount of (up to) $600 thus constitutes the baseline contractual amount under Article 41. This must be so; otherwise, the amounts specified for 2013, 2014, 2015, and 2016 would not be "modification[s]" because there would be nothing to modify.[3] It follows that

[2] No party disputes the judge's finding that the Christmas bonuses were a mandatory subject of bargaining.

[3] We disagree with the judge that *San Juan Bautista Medical Center*, 356 NLRB 736, 738 (2011), and *Hospital San Carlos Borromeo*, 355 NLRB 153, 153 (2010), support finding the Respondent obligated to pay higher bonus amounts. Those cases concerned whether the employers were entitled to an economic-hardship exemption under Law No. 148 from paying all or part of the statutory bonus. They were not because, as stated above, Law No. 148 does not apply where workers receive a bonus under a collective-bargaining agreement. Here as in those two cases, bonuses were provided under a collective-bargaining agreement, and Law No. 148 is inapplicable. But unlike in those two cases, the inapplicability of Law No. 148 is irrelevant. The 2017 bonus payments were not made by operation of law pursuant to Law No. 148. They were made in accordance with the terms of the expired 2013–2017 agreement, under which the baseline contractual amount (and the postexpiration status quo) happens to be the statutory amount. Indeed, in *Hospital San Carlos Borromeo*, the Board contemplated and distinguished the very scenario presented here, stating that "[t]here [was] no suggestion in the language" of the employer's collective-bargaining agreement "that the bonus required to be paid by the statute . . . was the sole entitlement created by the contract." 355 NLRB at 153.

after 2016, the amount of the contractual bonus would be the amount provided under Law No. 148 if the 2013–2017 agreement were extended; and if it were not and no successor agreement had been concluded, that same amount would be the postexpiration status quo. The 2013–2017 agreement had expired, and no successor agreement had been concluded when the time arrived to pay the 2017 bonuses. Thus, the Respondent maintained the status quo when it paid bonuses in December 2017 as provided in Law No. 148.

The same conclusion is supported by the apparent intent of the parties.[4] Their inclusion of language in the 2013–2017 agreement establishing bonuses "as provided in [Law No. 148]" with modifications in each of 4 specified years ending with 2016 is inconsistent with an intention that employees would continue to receive greater-than-statutory bonus amounts in years other than those four in the event of a post-2016 hiatus period or an extension of the 2013–2017 agreement—or, as happened, both.[5] In case either or both of those things happened, the parties evidently intended that the statutory amount would be provided, but *under the contract* and not by operation of law.[6] Interpreting the 2013–2017 agreement in this way properly considers the entirety of Article 41 without assuming, as the judge did, that any part of it is superfluous. See, e.g., *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995) (stating that it is a "cardinal principle of contract construction[ ] that a document should be read to give effect to all its provisions and to render them consistent with each other"); Restatement (Second) of Contracts § 203 cmt. b (1981) (recognizing that "[s]ince an agreement is interpreted as a whole, it is assumed in the first instance that no part of it is superfluous," and that "terms are rarely agreed to without reason").

In finding that the Respondent unilaterally changed the status quo, the judge applied a "past practice" analysis. She found that the Respondent had an established practice, "since 2003," of "[paying a bonus] annually according to the terms of the collective-bargaining agreements," and therefore "[e]mployees could expect the Christmas bonus to be paid according to the percent and maximums established in the collective-bargaining agreements, not the limits set by the Commonwealth's law." In other words, the judge equated a history of adhering to successive contracts with past practice. But a past practice is generally noncontractual and becomes a term or condition of employment through continued adherence over time *apart from* and even in contradiction to the parties' contract. See, e.g., *Intermountain Rural Electric Assn.*, 305 NLRB 783, 787–788 (1991) (finding employer's past practice for determining eligibility for overtime premium pay, which contradicted the contractual eligibility formula, was "an implied term and condition of employment by mutual consent of the parties"), enfd. 984 F.2d 1562 (10th Cir. 1993).[7] Here, the Respondent's historical payment of greater-than-statutory bonus amounts was always pursuant to the terms of Article 41 in the parties' successive collective-bargaining agreements. Critically, there is no evidence of how the parties previously applied Article 41 during hiatus periods, and therefore no evidence of an extracontractual past practice. See id. at 784 (noting that for "the first time in their bargaining history . . . the parties failed to agree to a successor contract before the previous contract expired," and "[t]hus no past practice exist[ed] concerning payment of insurance premiums during a contract hiatus"). But even assuming that a history of adhering to successive contracts can be said to create a past practice, the Respondent did not deviate from that past practice in 2017. As the judge said, the Respondent's established practice was to pay a bonus annually "according to the terms of the collective-bargaining agreements." The Respondent adhered to that practice in 2017, paying a bonus according to the terms of an expired collective-bargaining agreement that made "the limits set by the Commonwealth's law" the *contractual* baseline amount after 2016, and therefore the postexpiration status quo in 2017.[8]

Our dissenting colleague claims that the amount of the Respondent's postexpiration bonuses was "completely contrary to the parties' experience and expectations." This is pure speculation. There is no record evidence of the parties' experience following expiration of previous agreements, or of any course of dealing that might

[4] The Board may look to the parties' intent in interpreting a collective-bargaining agreement and determining the status quo. See, e.g., *Motor Car Dealers Assn.*, 225 NLRB 1110, 1112–1113 (1976).

[5] We observe that the parties' 2002–2005 collective-bargaining agreement granted employees greater-than-statutory bonuses "during the term of this agreement." That the parties agreed to change the language in subsequent contracts to limit greater-than-statutory bonuses to specific years confirms their apparent intent *not* to provide them in years other than those specified.

[6] This is not a meaningless difference. By providing for the statutory amount to be paid under the contract rather than by operation of law under Law No. 148, the 2013–2017 agreement precluded the Respondent from securing an economic-hardship exemption. See fn. 3 above.

[7] Thus, contrary to the judge, *Intermountain Rural Electric Assn.* does not support her past practice analysis. Neither does *Freedom WLNE-TV*, 278 NLRB 1293 (1986), which the judge also cites. In that case, there was a preexisting extracontractual practice that the parties subsequently agreed to incorporate into their collective-bargaining agreement. In this case, the payment of greater-than-statutory bonus amounts was always strictly contractual.

[8] We do not address the judge's contract coverage and waiver discussion because neither doctrine is applicable following expiration of a collective-bargaining agreement. See *Nexstar Broadcasting, Inc. d/b/a KOIN-TV*, 369 NLRB No. 61, slip op. at 2–4, 8 (2020).

otherwise have created a reasonable expectation of greater-than-statutory postexpiration bonuses. As discussed, there was previously only one hiatus period that overlapped with the holiday season, and the record does not show the bonus amounts paid at that time. Our colleague also says that payment of the statutory amount was outside the "context" of the parties' bargaining. We disagree. The parties bargained and agreed to the wording of the 2013–2017 agreement. After this agreement expired, its terms defined the status quo, as our colleague acknowledges. She disagrees with our analysis of those terms, contending that if the parties intended to make the contractual amount the statutory amount in years other than 2013–2016, they would have said so. In our view, they did say so. The dissent would require more explicit language, and absent that, she would make the postexpiration status quo the 2016 amount. Not being Scrooges, we would like nothing better than to be able to agree with our colleague. But our job is not to play Santa Claus; it is to decide the case based on the status quo established by the agreement. By its terms, the expired agreement made the baseline bonus amount the statutory amount, and the bonus amount for 2016 a "modification" of the statutory amount for that year only. We believe our analysis hews more closely to the terms of the expired agreement than does the dissent's.[9]

In sum, determination of the status quo here is based on the language of Article 41 of the expired 2013–2017 agreement. Under Article 41, the statutory bonus under Section 501 of Law No. 148 was the baseline contractual bonus amount, unless a "modification" granted employees a higher bonus. The expired 2013–2017 agreement provided for such a modification in 2013, 2014, 2015, and 2016; no modification of the baseline amount was provided for any other year. Accordingly, the Respondent lawfully adhered to the status quo when it paid bonuses as provided in Section 501 of Law No. 148 in December 2017.

B. The Contract-Modification Allegation[10]

We likewise disagree with the judge's finding that the Respondent unlawfully modified the extended collective-bargaining agreement by granting employees baseline contractual bonuses equal to the statutory amount under Law No. 148 in 2018.

In determining whether an employer has modified a collective-bargaining agreement without the union's consent in violation of Section 8(a)(5) within the meaning of Section 8(d), the Board will not find a violation if the "employer has a sound arguable basis for its interpretation of [the] contract and is not motivated by union animus or acting in bad faith." *Bath Iron Works Corp.*, 345 NLRB at 502 (ellipsis and internal quotation marks omitted). The "sound arguable basis" standard is met where the employer's interpretation of the relevant contractual language is at least colorable. Id. at 503. Where that is the case, the Board does not seek to determine which of two equally plausible contract interpretations is correct. Id.; *NCR Corp.*, 271 NLRB 1212, 1213 (1984).

Our disposition of the unilateral-change allegation makes the outcome here a foregone conclusion. There are not two equally plausible contract interpretations here. There is only one plausible interpretation, and it favors the Respondent. Article 41 of the 2013–2017 agreement makes the bonus amount provided under Law No. 148 the baseline contractual amount. Article 41 modifies the baseline amount, but only in 4 specified years ending with 2016. As explained above, in November and December 2017, after the 2013–2017 agreement and its first extension expired, the bonus amount provided under Law No. 148 was the status quo, to which the Respondent lawfully adhered. Subsequently, the parties revivified the 2013–2017 agreement and extended it through January 31, 2019. Thus, in December 2018, the bonus amount provided under Law No. 148 was the contractual amount. Necessarily, then, the Respondent had a sound arguable basis for interpreting the language of the 2013–2017 agreement as authorizing payment of bonuses as provided under Law No. 148 in 2018. The Respondent therefore adhered to

[9] Our analysis is limited to the facts of this case, and we reject the dissent's attempt to extend it to other factual settings.

[10] At several places, the judge incorrectly characterized this as a unilateral-change allegation. The Board has explained the differences between "unilateral change" and "contract modification" as follows:

> The "unilateral change" case and the "contract modification" case are fundamentally different in terms of principle, possible defenses, and remedy. In terms of principle, the "unilateral change" case does not require the General Counsel to show the existence of a contract provision; he need only show that there is an employment practice concerning a mandatory bargaining subject, and that the employer has made a significant change thereto *without bargaining*. The allegation is *a failure to bargain*. In the "contract modification" case, the General Counsel must show a contractual provision, and that the employer has modified the provision. The allegation is a failure to adhere to the contract. In terms of defenses, a defense to a unilateral change can be that the union has waived its right to bargain. A defense to the contract modification can be that the union has consented to the change. In terms of remedy, a remedy for a unilateral change is to bargain; the remedy for a contract modification is to honor the contract.

Bath Iron Works Corp., 345 NLRB 499, 501 (2005) (emphasis in original), enfd. sub nom. *Bath Marine Draftsmen's Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007).

that agreement when it paid its unit employees $600 bonuses in December 2018 as provided under Law No. 148.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. January 14, 2021

John F. Ring, Chairman

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

The majority today approves an employer's decision to take advantage of a contractual hiatus to cut workers' Christmas bonus down to a level significantly below anything that was paid during the life of the contract. The majority then inexplicably finds that the Employer can maintain this cut even after the expired agreement is revived and extended. These conclusions—based on the majority's imaginative interpretation of the agreement—defy common sense, federal policy, and Board precedent. Because this Scrooge-like outcome cannot possibly be reconciled with the Employer's statutory duty to preserve the status quo (much less the Christmas spirit),[1] I dissent.

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The facts alone demonstrate that the majority decision simply cannot be right. Every year from 2002 to 2016, the Employer paid its employees a Christmas bonus on the day before Thanksgiving using a formula set forth in the parties' collective-bargaining agreement. The negotiated formula—which was based on a statutory minimum modified by a percentage of salary—had yielded an increased bonus every year since 2005 from a maximum bonus of $2550 in 2002 to $3460 in 2016, amounts well above the applicable statutory minimum of $600.

With respect to the specific timeframe at issue here, the parties' 2013–2017 agreement stated that "[t]he Association will grant the Christmas Bonus as provided in Law No. 148 . . . with the following modification:" and then listed the augmented bonus amounts for each relevant year of the collective-bargaining agreement.[2] So, consistent with the parties' and the employees' long experience, the Christmas bonuses paid under this agreement always far exceeded the statutory minimum. In 2016, for example, which was the last full calendar year of the agreement, the average bonus was $2884.26 per employee.

As the parties' agreement neared its June 2017 expiration, they began negotiating for a successor agreement. The parties agreed to several contract extensions throughout 2017 and 2018 except for a period between November 1 and December 20, 2017. During that hiatus, which spanned Thanksgiving, the Employer proposed in November to pay only the statutory Christmas bonus amount of $600 for 2017, while the Union maintained that the Employer was required to pay a bonus based on the 2016 formula in the expired agreement. The Employer, however, implemented its proposal and, in mid-December 2017, paid its employees a Christmas bonus of only $600.

Negotiations continued during 2018. As November approached, the Union again demanded that the Employer calculate employees' Christmas bonus using the 2016 formula. By this time, the parties were operating under an extension of the expired agreement. Nevertheless, the Employer once again took the position that, absent a new agreement, it was required to pay only the statutory minimum of $600, and that is exactly what it did.

Not surprisingly, the Employer's unilateral stinginess prompted the Union to file the charges leading to this case.

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As stated above, until the Employer unilaterally reduced the Christmas bonus, employees had never received only the statutory minimum. No collective-bargaining

[1] To be fair, at least the Employer did not elect to substitute a 1-year membership in the Jelly of the Month club. Though, from the workers' perspective, a loss of hundreds, sometimes thousands, of dollars in their expected bonus might nonetheless be the "biggest bag over the head punch in the face" they ever got. See Chechik, J. (Director). (1989). *National Lampoon's Christmas Vacation* [film]. Hughes Entertainment.

[2] Puerto Rico Law No. 148 is the local statute mandating that certain employers pay a Christmas bonus. It does not apply, however, to collectively bargained bonuses unless the amount falls below the applicable statutory minimum amount, again $600 in this case, in which case the employer must pay the employee the difference. 29 L.P.R.A. §§ 501–507.

So, as in this case, the statute permits employers with represented workforces to agree to pay higher Christmas bonuses. And, here, the relevant contract language provided, "[The Employer] will grant the Christmas Bonus as provided in [the Puerto Rico statute, Law No. 148] with the following modification:

> [8.60 percent] of the salaries earned up to a maximum of $37,000 in 2013.
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> [8.60 percent] of the salaries earned up to a maximum of $38,000 in 2014.
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> [8.65 percent] of the salaries earned up to a maximum of $39,000 in 2015.
>
> [8.65 percent] of the salaries earned up to a maximum of $40,000 in 2016."

agreement had ever set the annual Christmas bonus at the statutory minimum, and no agreement addressed the Employer's Christmas bonus obligation *after* contract expiration. Once the contract expired, of course, the Employer's duty was determined not by contract or by Puerto Rico law, but rather by the National Labor Relations Act, which requires employers to maintain the status quo, promoting collective bargaining and avoiding labor disputes.[3]

The contract language seized on by the majority simply cannot support its interpretation that whenever no contract was in effect, the Employer was free to pay only the statutory minimum bonus. As noted above, the relevant collective-bargaining agreement, the 2013–2017 contract, recited that:

> *[The Employer] will grant the Christmas Bonus as provided in [the Puerto Rico statute, Law No. 148] with the following modification:* [emphasis added]
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> [8.60 percent] of the salaries earned up to a maximum of $37,000 in 2013.
> [8.60 percent] of the salaries earned up to a maximum of $38,000 in 2014.
> [8.65 percent] of the salaries earned up to a maximum of $39,000 in 2015.
> [8.65 percent] of the salaries earned up to a maximum of $40,000 in 2016.

By its terms, then, the agreement established a Christmas bonus level through 2016. It did not address what would happen thereafter. The Employer and the Union clearly contemplated that a successor agreement would resolve that matter. But, as we know, the parties did not reach a new agreement right away. That brings us to the crucial question in this case: What was the status quo that the Employer was required to maintain under federal labor law?

We all agree that the Board must look to the collective-bargaining agreement to answer that question.[4] But the majority rejects the easy and obvious answer: that, as the Union maintained, the status quo is defined by the 2016 bonus level, the last level specified in the expired contact and reflected in the last Christmas bonus that the Employer actually paid *before* its federal-law duty to maintain the status quo was triggered.

Instead, the majority insists that the contract language—that the Employer "will grant the Christmas Bonus as provided in [the Puerto Rico statute] with the following modification . . ."—plainly means that when the contract expires, the "modification" specified in the contract is automatically erased, and only the statutory minimum remains, becoming the status quo for purposes of federal labor law. If the parties had intended that extraordinary result, then they surely would have said so, with a clear statement of their intent.[5] They did not, of course. And that is no accident.

A reversion to the statutory minimums was completely contrary to the parties' experience and expectations. Every collective-bargaining agreement had provided for amounts above the statutory minimum. The last agreement provided for an increased bonus for every year of the agreement's term. At no time had employees been paid the statutory minimum. And, in bargaining, the Employer's November 2017 proposal to pay the statutory minimum was rejected and quickly revised to reflect the 2016 amounts (which of course the Employer did not pay in any event).[6] As the Supreme Court has observed, in upholding the Board's finding of an unlawful unilateral change, "the law of labor agreements cannot be based upon abstract definitions unrelated to the context in which the parties bargained and the basic regulatory scheme underlying the context."[7] The majority's contract

[3] See, e.g., *Wilkes-Barre General Hospital*, 362 NLRB 1212, 1216 (2015) (discussing Board's status quo doctrine, as approved by Supreme Court), enfd. 857 F.3d 364 (D.C. Cir. 2017). See also National Labor Relations Act, Sec. 1, 29 U.S.C. §151 (declaring statutory policy). The reasons for the status quo requirement are clear: It is hard for unions to bargain productively if employers are free to change existing terms and conditions as they wish, and employees may well protest when their union is bypassed and their prior terms diminished. See generally *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991); *NLRB v. Katz*, 369 U.S. 736, 743–747 (1962).

[4] See, e.g., *Richfield Hospitality, Inc. as Managing Agent for Kahler Hotels, LLC*, 368 NLRB No. 44, slip op. at 3 (2019).

[5] A provision in line with the majority's interpretation would have read something like "After expiration of this agreement, the employer is under no obligation to pay a Christmas bonus except as provided in" the Puerto Rico statute. Nothing close to such language appears in the contract.

This case may seem unusual, and the stakes small, but the approach that the majority adopts today would seemingly apply where a collective-bargaining agreement ties wage rates to the state or federal minimum wage. Imagine an agreement that simply says that employees will be paid a specified amount above the statutory minimum wage, increasing each year over the life of the contract. On the majority's view, at the end of the contract, the Employer would be free to reduce employees' pay to the minimum wage, regardless of what they had been earning at the end of the contract term. A better recipe for a labor dispute is hard to picture.

[6] This would be a different case if the General Counsel had argued that the status-quo doctrine required the Employer to *keep increasing* the Christmas bonus level after the contract expired, in line with the increases provided for over the specified years (2013, 2014, 2015, and 2016). The Board has recently rejected such an argument in a similar case, holding that the employer there was required only to keep paying what the contract required for its final year and not to continue to make increases. See *PG Publishing Co., Inc. d/b/a Pittsburgh Post-Gazette*, 368 NLRB No. 41, slip op. at 3 (2019). But that case also illustrates why the Board must find a violation here, where the Employer failed to maintain the final year's bonus level.

[7] *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 430 (1967). Despite the Employer's many proposals between December 2017 and December 2018 offering to maintain the Christmas bonus at the 2016 amount, the

interpretation here is an exercise in abstract thinking, completely divorced from the realities of the parties' experience; as such, it is not coextensive with the Employer's statutory obligation. *PG Publishing Co., Inc.,* 368 NLRB No. 41, slip op. at 3 (2019), citing *Wilkes-Barre Hospital Co. v. NLRB,* 857 F.3d 364, 375–377 (D.C. Cir. 2017) (the collective-bargaining agreement's durational clause speaks to contractual rights, not statutory rights).[8]

It makes no sense, then, to say that a unilateral reduction in the Christmas bonus paid to employees amounted to preserving the status quo. That status quo never existed. Permitting such a disruptive change creates an incentive for the Employer *not* to reach a new agreement, forces the Union to win back in bargaining a benefit that employees already enjoyed, permits an employer to impose its earlier, rejected proposal through unilateral action during negotiations on precisely that matter, and potentially provokes employees to take economic action against the Employer. Those results are completely contrary to the policies of the Act.

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This should have been a straightforward case. The judge applied the correct law, and reached the correct result, ordering the restoration of hundreds of dollars in lost compensation for the workers affected.

Instead of simply adopting the judge's well-reasoned analysis, the majority takes a somewhat tortured analytical path to reach an outcome that both defies common sense and undermines the Board's well-established doctrines prohibiting unilateral changes. Unfortunately, this is not an aberration. In cases large and small, the majority has dismissed those policies and made it easier for employers to change working conditions without bargaining.[9] I cannot support adding this case to the list.

Dated, Washington, D.C. January 14, 2021

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

Manijee Ashrafi-Negroni, Esq., for the General Counsel.
Carolina Santa Cruz-Sadurni and *Fernando A. Baerga-Ibañez, Esqs.,* for the Respondent.
Alexandra Sanchez-Mitchell and *Miguel Simonet-Sierra, Esqs.,* for the Charging Party.

DECISION

SHARON LEVINSON STECKLER, Administrative Law Judge. These cases involve the Respondent employer's reduction in Christmas bonuses for two consecutive years while the parties negotiated a successor collective-bargaining agreement. I find that Respondent unlawfully reduced the Christmas bonuses twice.

STATEMENT OF THE CASE

This case is before me on a stipulated record. Charging Party Union Internacional de Trabajadores de la Industria de Automoviles, Aeroespacio e Implementos Agricolas, U.A.W., Local 1850 (the Union), filed charge 12–CA–218502 on April 16, 2018,[1] and filed an amended charge on June 19, 2018, against Asociacion de Empleados del Estado Libre Asociado de Puerto Rico (Respondent). General Counsel issued a Complaint and Notice of Hearing on August 31, 2018. The Union subsequently filed charge 12–CA–232704 on December 13, 2018 and an amended charge on March 4, 2019. General Counsel issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (complaint) on February 27, 2019. Respondent filed timely answers. On August 9, 2019 the parties submitted a Joint Motion and Stipulation of Facts, requesting that I decide the

majority claims that reliance on bargaining context is "speculative" absent evidence of bonus amounts that may have been paid during hiatus periods pending negotiations of earlier agreements. But such evidence, which the Employer would have access to, would not change the fact that those earlier agreements provided for successive and ever-increasing bonus amounts, from which the Employer has, during negotiations for post-2016 bonus amounts, made a significant unilateral change to a mandatory subject of bargaining.

[8] This interpretation cannot even be reconciled with the plain language of the collective-bargaining agreement. As the General Counsel correctly explained, "[t]he mention of Law 148 in Article 41 . . . merely refers to Puerto Rico's statutory requirement that employers pay an annual Christmas bonus, and it does not have any bearing on the formula to be used to calculate that bonus, because the contractual formula greatly exceeds the Law 148 formula." For the same reasons, when the Employer again paid a $600 bonus in 2018 during an extension of the collective-bargaining agreement, its defense of a contract-modification claim also fails. There can be no "sound arguable basis" for an interpretation of the contract language completely at odds with the language of the agreement, the Employer's bargaining proposals and communications, and with the parties' and employees' 15 years of experience. *Bath Iron Works Corp.*, 345 NLRB 499, 502 (2005), affd. sub nom. *Bath Marine Draftsmen's Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007). It is well settled that in order to assess the reasonableness of the employer's interpretation, the Board examines "'both the contract language itself and relevant extrinsic evidence, such as a past practice of the parties in regard to the effectuation or implementation of the contract provision in question, or the bargaining history of the provision itself.'" *Pacific Maritime Assn.*, 367 NLRB No. 121, slip op. at 4 (2019) (citing *Knollwood Country Club*, 365 NLRB No. 22, slip op. at 3 (2017)).

[9] See, e.g., *MV Transportation, Inc.*, 368 NLRB No. 66 (2019) (overruling Board's decades-old waiver standard in favor of "contract coverage" standard for determining when employer's unilateral changes are lawful); *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017) (overruling precedent that limited employer's ability to make unilateral changes after contract expiration). See also *Mike-Sell's Potato Chip Co.*, 368 NLRB No. 145 (2019); *Oberthur Technologies of America Corp.,* 368 NLRB No. 5 (2019); *E.I. DuPont de Nemours & Co.*, 367 NLRB No. 145 (2019).

[1] The charge itself is dated April 11, 2016 without filling in the date filed; the Region's date of service is April 16, 2018. (GC Exh. 1(a)–(b)).

matter based upon a stipulated record and therefore waiving their rights to examine and cross-examine witnesses. The parties twice requested extensions to submit translated exhibits, which were received on September 11, 2019. The parties submitted briefs on October 16, 2019. Upon the entire record[2] and after carefully considering the parties' respective briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, Respondent admits, and I find, it has been a Puerto Rico corporation with an office and place of business in San Juan, Puerto Rico (Respondent's facility), and has been engaged in providing savings and loan services, insurances and related financial services to its members. During the past 12 months, Respondent, in conducting its business operations described above, derives gross revenues valued in excess of $500,000 and purchased and received at its San Juan, Puerto Rico facility, goods valued in excess of $50,000 directly from points outside the Commonwealth of Puerto Rico. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (Stip. ¶¶2–3)

The parties admit, and I find, the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE PARTIES' HISTORY OF LABOR RELATIONS

Since at least 1992, based upon Section 9(a) of the Act, the Union has been the collective-bargaining representative of the following unit, which is appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

> All office, skilled office and maintenance employees and employees used to perform repairs at Respondent's building in its place of business at Hato Rey, or any other place on the Island of Puerto Rico, including Playa Santa del Caribe; excluding all professionals, executives, administrators, the executive director's driver, confidential employees, guards and supervisors as defined in the Act, , the secretaries for the executive director, the secretary of the assistant executive director, the secretary for the director of finance, the secretary of the planning and budget director, the secretary of the personnel and industrial relations director, the secretary of the legal affairs office director, a secretary for each assistant to the executive director up to a maximum of four secretaries, a secretary for each division by which the executive director carries out his functions, up to a maximum of four secretaries, the auditor's secretary and the secretary of the regional services director.

(Stip. ¶¶8–9).

Over the years, Respondent and the Union entered into several successive collective-bargaining agreements, the most recent of which was in effect from July 1, 2013, through June 30, 2017. After the most recent collective-bargaining agreement expired, the parties extended the collective-bargaining agreement in successive period through the remainder of 2017 and 2018, except for November 1, 2017, through December 20, 2017. (Stip. ¶¶14–15; Jt. Exh. 5.) Throughout negotiations, Respondent never contended any inability to pay or financial difficulties that precluded paying economic benefits to employees. (Stip. ¶20.)

III. THE CHRISTMAS BONUSES

From 2002 through 2016, annual Christmas bonuses were encompassed in Article 41 of the collective-bargaining agreements and Respondent paid accordingly. Before the 2013–2017 contract, the percent of 8.50 percent of various salaries and Respondent determined the amount of the bonus as a stated percentage of an employee's annual earnings, up to a maximum specified in the collective-bargaining agreement. The specific language of the 2013–2017 collective-bargaining agreement, similar to the previous contracts, states:

> The Association will grant the Christmas Bonus as provided in Law No. 148 of June 30, 1969, as amended, with the modification:
>
> Eight point sixty percent (8.60 percent) of the salaries earned up to a maximum or $37,000 in 2013;
>
> Eight point sixty percent (8.60 percent) of the salaries earned up to a maximum of $38,000 in 2014;
>
> Eight point sixty-five percent (8.65 percent) of the salaries earned up to a maximum of $39,000 in 2015;
>
> Eight point sixty-five percent (8.65 percent) of the salaries earned up to a maximum of $40,000 in 2016.
>
> Salaries to be considered shall be the one earned between October 1st of the previous year and September 30th of the year corresponding to the bonus.

The following table reflects the collective-bargaining agreements, and the percentage of the salary to be paid to the maximum salary.

Contract Years and Contract Section	**percentage Amount to be Paid**	**Up to Maximum Salary of:**	**Based upon Year Starting and Ending**
2002–2005 Art. 41 (Jt. Exh. 1)	8.5 percent	$30,000.00	October 1, of year before and ending September 30 of year corresponding with bonus
2006–2009 Art. 41 (Jt. Exh. 2)	8.5 percent	$32,000 for years 2005–2006; $33,000 for year 2007; $34,000 for year	October 1, of year before and ending September 30 of year

[2] The following abbreviations are used: "Stip." For Joint Motion and Stipulation of Facts and Documents, "GC Exh." for General Counsel exhibits, "Jt. Exh." for Joint Exhibits, "GC Br." for General Counsel brief, "R. Br." for Respondent brief, and "U Br." for Charging Party brief.

Contract Years and Contract Section	percentage Amount to be Paid	Up to Maximum Salary of:	Based upon Year Starting and Ending
		2008	corresponding with bonus
2009–2013 Art. 41 (Jt. Exh. 3)	8.5 percent	$34,000 for year 2009; $35,000 for year 2010; $36,000 for year 2011; $37,000 for year 2012	October 1, of year before and ending September 30 of year corresponding with bonus
2013–2017 and extensions Art. 41 (Jt. Exh. 4)	8.60 percent for 2013 8.60 percent for 2014 8.65 percent for 2015 8.65 percent for 2016	$37,000 in 2013 $38,000 in 2014 $39,000 in 2015 $40,000 in 2016	October 1, of year before and ending September 30 of year corresponding with bonus

In 2016, each employee received Christmas bonus pay (gross amount) between $437.06 and $3460.00. In total, employees, received $651,843.47. (Jt. Exh. 6(b).)

The law referred to in the contract is in Puerto Rico statutes. The law provides that employees are entitled to a small Christmas bonus. However, according to 29 L.P.R.A. §506, the statutory provisions do not apply when employees are covered by a collective agreement, "except in the event where the amount of the bonus to which entitled by such collective agreement may result lower than the one provided by this chapter in which case they shall receive the necessary amount to complete the bonus provided hereby."

The collective-bargaining agreement also includes a "zipper" clause, Article 53, entitled "Validity":

> This Collective Bargaining Agreement shall be in effect from July 1, 2013 until June 30, 2017 and subsequently from year to year, unless one party notifies the other (party) in writing, by certified mail with acknowledgement of receipt, within sixty (60) days prior to June 30, 2017, or any other subsequent anniversary date, whichever the case, of its intention to end it or modify it through the negotiation of a new Collective Bargaining Agreement. If any clause of this Collective Bargaining Agreement provides any specific term, that shall prevail over the term that is provided herein.

(Jt. Exh. 4(b), p. 51.)

After the collective-bargaining agreement expired, the parties agreed to extensions until October 31, 2017, then December 21, 2017, through January 31, 2019. (Stip. ¶14.)

IV. IN 2017 AND 2018 RESPONDENT REDUCES THE CHRISTMAS BONUS PAYMENTS

On November 29, 2017, Respondent's counsel sent a letter about negotiations, which included a proposed Christmas bonus. Respondent notified "all unionized personnel," on December 1, 2017 of a proposed increased in the Christmas bonus, among other items, and that the negotiations were continuing. (Stip. ¶24; Jt. Exh. 10(b).) On December 5, 2017, the Union accepted Respondent's proposed Christmas bonus of 8.65 percent of salary to a maximum of $40,000 for years 2017 and 2018. (Jt. Exhs. 11(b), 12(b).) That term was reiterated and then Respondent attached a condition to the Christmas bonus—subject to acceptance of the extending the contract until June 30, 2019 and certain salary provisions. (Jt. Exh. 15(b).) The parties did not extend the contract or complete negotiations.

Despite traditionally paying the Christmas bonus the day before Thanksgiving, Respondent waited to pay employees on December 15, 2017. For the 2017 Christmas bonus, Respondent significantly reduced the Christmas bonus from previous years and paid almost every bargaining unit employee a gross amount of $600.00. The employees, in total, received a gross amount of $127,924.44. (Stip. ¶30; Jt. Exh. 16(b).)[3]

Throughout 2018, the parties continued negotiations during the contract extension. They did not reach an agreement for a successor contract. On November 15, 2018, Local 1850 President Delgado, by letter, requested Respondent to pay the Christmas bonus as historically paid, "on Thanksgiving Eve," or November 21, 2018, in order to permit employees to make purchases for Thanksgiving and Christmas. Delgado cited the contract language requiring the amount as 8.65 percent of the wages, up to the maximum of $40,000. (Jt. Exh. 31(b).)

On November 20, 2018, Respondent, by letter, notified Delgado:

> As you know, beyond the applicable law, the payment of the Christmas Bonus is a matter of collective bargaining. Therefore, your request does not proceed until the parties can reach an agreement.
>
> I trust in good faith, so that the parties can reach the necessary agreements to end collective bargaining.

(Jt. Exh. 32(b).)

The parties met in negotiations on November 26 and December 12. The parties agreed to extend the collective-bargaining agreement "except in the salary article" through January 10, or until the parties signed an agreement, whichever came first. Respondent proposed to keep the same Christmas bonus language in the successor contract. (Jt. Exh. 34(b).)

By November 30, 2018, the parties remained in negotiations, with tentative agreements in certain areas, but no agreements in wages or the Christmas bonus. (Stip. ¶¶52–53.) On December 15, 2018, Respondent paid to employees a maximum Christmas

[3] One received $409.02; another received $315.42. Approximately 210 employees received the 2016 bonus. (Jt. Exh. 16(b).)

bonus of $600.00 gross pay instead of the formula stated in the extended collective-bargaining agreement. (Stip. ¶¶50–51; Jt. Exh. 36(b).)

V. RESPONDENT'S INFORMATIVE MOTION

When it filed its brief, Respondent also filed a motion stating that it declared impasse on September 5, 2019, and it paid the difference required to employees for the 2018 Christmas bonus. General Counsel's response stated that Respondent disclosed this information but did not provide evidence to verify what was paid to each aggrieved employee, whether it paid the interest due, and whether it paid the excess tax amounts. As a result, General Counsel said this matter was better left to the compliance phase. Respondent also did not state whether it posted anything to employees, notified the Union before it paid the Christmas bonuses and does not show with the Motion what amounts were paid.

I issued an Order to Show Cause in which Respondent, by November 1, 2019, was ordered to provide its position on why the additional information was relevant and provide argument on how it applied. The Order also provided General Counsel and the Union an opportunity to reply to Respondent's position by November 8, 2019. On November 1, 2019, Respondent withdrew its motion because General Counsel apparently did not stipulate to the proposed additional facts; Respondent stated, if necessary, the matter would be handled in the compliance phase.

ANALYSIS

I. THE PARTIES' POSITIONS

A. General Counsel

Respondent's failure to pay the 2017 bonus contradicts past practice and successor contract proposals Respondent made to maintain the 2016 bonus formula. (GC Br. at 2.) General Counsel cites *Richfield Hospitality, Inc.*, 368 NLRB No. 44 (2019), in which Respondent violated Section 8(a)(5) when it failed to maintain longevity pay increases post-contract expiration. Because the 2018 Christmas bonus was due during an extension of the collective-bargaining agreement, Respondent violated Section 8(a)(5) and 8(d) with a mid-term modification. General Counsel also points out that the contract coverage test does not yield a different result.

B. Union

Since at least 2006, Respondent paid the employees a Christmas bonus in accord with the terms of the collective-bargaining agreement. The collective-bargaining agreement was in effect during the week of Thanksgiving 2017, which coincided historically with the time Respondent paid the Christmas bonuses.

C. Respondent

Respondent contends that the collective-bargaining agreement's specific language limits payment of the Christmas bonuses to years 2013 through 2016, but nothing for years 2017 and 2018. Although the collective-bargaining agreement was extended, none of the extensions included modifications to the Christmas bonus amounts. (R. Br. at 6.) Respondent states no past practice existed because the contract term was no longer applicable, so P.R. Law 148 applied instead and paying the $600 per employee was appropriate for 2017 and 2018.

The agreement's language was clear and unmistakable. The parties did not agree on any bonuses for 2017 and 2018 and therefore Respondent is responsible only for the years stated in the agreement, which defines the status quo. Additionally, Respondent's interpretation of the language is reasonable and logical and the Board may not "determine which of two equally plausible contract interpretations is correct." (R. Br. at 2.)

II. THE CHRISTMAS BONUS IS A MANDATORY TERM AND CONDITION OF EMPLOYMENT

Changes to payment of wages are mandatory subjects of bargaining. *Strategic Resources, Inc.*, 364 NLRB No. 42, slip op. at 7–8 (2016). Bonuses, as payments to employees, are considered wages and therefore a mandatory subject of bargaining. *Lenawee Stamping Corp. d/b/a Kirchhoff Van-Robb*, 365 NLRB No. 97, slip op. at 1 fn. 2 and 8 (2017). A bonus is a term and condition of employment over which an employer must bargain when the bonus was paid regularly and was tied to employment-related factors. *Bob's Tire Co.,* 368 NLRB No. 33, slip op. at 1 (2019).

The Christmas bonuses were paid regularly and tied to employment-related factors. Regarding regular payment, the bonuses were paid each year, beginning with the 2002–2005 collective-bargaining agreement and continued each year thereafter. The formula to determine the bonus was applied annually at the same time. The Christmas bonus was tied to an employment-related factor: how much employees earned in a 12-month period, ending September 30 of the year in which the bonus was paid. Respondent had no discretion in when the bonus was calculated or the formula to be used because the collective-bargaining agreement stated the formula. *Richfield Hospitality, Inc. as Managing Agent for Kahler Hotels, LLC,* 368 NLRB No. 44, slip op. at 20 (2019). These factors demonstrate that the Christmas bonuses were terms and conditions of employment and a mandatory subject of bargaining. *Bob's Tire Co.*, supra; *Freedom WLNE-TV*, 278 NLRB 1293, 1296–1297 (1986) (Christmas bonus).[4]

III. IN 2017 AND 2018 RESPONDENT VIOLATED SECTION 8(A)(5) AND (1) BY FAILING TO PAY THE EMPLOYEES' CONTRACTUAL CHRISTMAS BONUS

A. In 2017 Respondent Unilaterally Changed the Paid Amount of Employees' Christmas Bonus

The Christmas bonus was a past practice and Respondent was obligated to maintain the past practice when the collective-bargaining agreement expired. Because the Christmas bonus was a past practice, Respondent had an obligation to notify the Union

[4] The amount of the change is not de minimis. For an employee who received a bonus of $3460 in 2016, the 2017 Christmas bonus was reduced by $2860, and then repeated in 2018. For these employees, the differences in the amounts of the bonus are not chump change. Therefore, the changes are material and substantial. See generally *SMI/Division of DCS-CHOL Enterprises, Inc.*, 365 NLRB No. 152 (2017) (employer's unilateral grant of $100 bonus violative).

and bargaining over it before implementing the change and, in the meantime, had an obligation to maintain the Christmas bonus as the status quo. Applying contract coverage and waiver tests, Respondent still had an obligation to bargain before it implemented changes to the Christmas bonus.

1. The Christmas bonus was a past practice and Respondent was obliged to continue the status quo

During the period in which parties are negotiating a new collective-bargaining agreement and expiration of the old one, the status quo controls whether an employer may implement a unilateral change and is controlled by the substantive terms of the expired collective-bargaining agreement. *Wilkes-Barre Hospital Co., LLC v. NLRB*, 857 F.3d 364, 374, (D.C. Cir. 2017) citing, inter alia, *Intermountain Rural Elec. Assn. v. NLRB*, 984 F.2d 1562, 1567 (10th Cir. 1993). The terms of the expired collective-bargaining agreement remain the status quo of all mandatory subject of bargaining. *Richfield Hospitality, Inc. as Managing Agent for Kahler Hotels, LLC*, 368 NLRB No. 44, slip op. at 3 (2019). The party asserting the existence of a past practice, here the General Counsel, must establish the regularity and frequency specific to its circumstances. *General Die Casters, Inc*., 359 NLRB 89, 90 (2012); *North Star Steel Co*., 347 NLRB 1364, 1367 (2006).

A past practice must occur with such regularity and frequency that employees could reasonably expect the "practice" to continue or reoccur on a regular and consistent basis. *Philadelphia Coca-Cola Bottling Co*., 340 NLRB 349, 353–354 (2003), enfd. 112 Fed. Appx. 65 (D.C. Cir. 2004); *Eugene Iovine, Inc*., 328 NLRB 294, 297 (1999). A past practice that becomes a term and condition of employment cannot be changed without offering the collective-bargaining representative notice and an opportunity to bargain, absent clear and unequivocal waiver of this right. *Sunoco, Inc*., 349 NLRB 240, 244 (2007), citing *Granite City Steel Co*., 167 NLRB 310, 315 (1967); *DMI Distribution of Delaware*, 334 NLRB 409, 411 (2001); *Exxon Shipping Co*., 291 NLRB 489, 493 (1988); *Queen Mary Rest. Corp. v. NLRB*, 560 F.2d 403, 408 (9th Cir. 1977).

While the parties are negotiating a collective-bargaining agreement, an employer must refrain from any implementing changes "'unless and until an overall impasse has been reached on bargaining for an agreement as a whole,' subject to certain exceptions." *Oberthur Technologies of America Corp*., 368 NLRB No. 5, slip op. at 2 fn. 7 (2019), citing *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. mem. sub nom *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994), and *RBE Electronics of S.D.*, 320 NLRB 80, 81–82 (1995). The expired collective-bargaining agreement, with limited exceptions, remains the status quo, which an employer must maintain. *Intermountain Rural Electrical Assn. v. NLRB*, 984 F.2d at 1568.

The Christmas bonus is indeed a past practice. *Freedom WLNE-TV*, 278 NLRB at 1299. There, the Board adopted the administrative law judge's analysis regarding a Christmas bonus withheld while the employer and union negotiated a successor collective bargaining agreement. Id. The formula was already known and was considered a pre-existing condition. Id. The condition survived contract expiration and the employer was required to bargain before making the decision to withhold the benefit. Id., citing *Struther Wells Corp*., 262 NLRB 1080, 1081 (1982).

Similarly, in *Intermountain Rural Ec. Assn.*, 305 NLRB 783, 787–788 (1991), enfd. 984 F.2d 1562, reh'g denied (10th Cir. 1993), the parties were negotiating a successor contract after the previous contract expired. At issue was employer's alleged unilateral change of overtime premium pay calculation. The previous contract's language had changed, yet since that time—over 7 years—the employer retained the same overtime pay calculation. As in the current situation, "[t]his uninterrupted and accepted custom had thus become an implied term and condition of employment by mutual consent of the parties." Id.

Here, General Counsel establishes the past practice, which existed since 2003 and forward. It was paid annually according to the terms of the collective-bargaining agreements. Although the percentage amount and the maximum salary amount changed with the successive bargaining agreements, Although the parties bargained about the bonuses during negotiations, the parties reached no agreement. Employees could expect the Christmas bonus to be paid according to the percent and maximums established in the collective-bargaining agreements, not the limits set by the Commonwealth's law.[5] Consistent with *Freedom WLNE-TV*, supra, Respondent had an obligation to notify the Union and give it an opportunity to bargain over its intended change. In the meantime, Respondent was obligated to maintain the status quo of the expired collective-bargaining agreement.

2. Contract coverage and waiver tests

Respondent contends that, because the language of the expired agreement did not contain modification for year 2017, it had no obligation to continue the term according to the 2016 payment schedule and instead reverted to the terms of PR Law No. 148. (R. Br. at 10.) This argument is unavailing because of the law's exception for collective-bargaining agreements. Two cases discuss the Puerto Rican law establishing Christmas bonuses, which is cited within the language of Article 41, and its impact upon contractual provisions: *San Juan Bautista Medical Center*, 356 NLRB 736 (2011) and *Hospital San Carlos Borromeo*, 355 NLRB 153 (2010). Although both cases involved mid-term modifications, both relied upon exemptions from the Christmas bonus law. In both cases, the employers were not excused from the Christmas bonuses as stated in their respective collective-bargaining agreements. *Hospital San Carlos Borromeo*, 355 NLRB at 153. As in *Wilkes-Barre*, 857 F.3d at 375–376, the term of contract speaks only to contractual obligations and not the employees' statutory rights under the Act.

Wilkes-Barre, supra, also is instructive under a contract

[5] Respondent does not raise a defense of either impasse or *Bottom Line* exceptions. The *Bottom Line* exceptions that permit an employer to implement changes are: when the union delays bargaining; and, when economic exigencies compel prompt action. *Bottom Line*, 302 NLRB at 374.

coverage test.[6] Similar to the present case, the collective-bargaining agreement expired. The employer withheld longevity pay increases. The agreement specified the years in which the raises were effective. 857 F.3d at 368–369. As in the case here, the parties had not bargaining to impasse and the employer did not notify the union of its intentions. Id. at 374. The employer argued that the longevity increases were limited to the term of the agreement and the durational clause did not change the courts conclusion. Id. at 377. Because the durational clause said the terms applied during the term of the agreement, the court found that the union's "statutory claim" survived and were limited to a time certain. Id. at 377.

The court then considered whether the union waived its rights. Waiver must be clear and unmistakable. Id. at 377. The court stated that neither the general contract provisions nor silence are sufficient to establish waiver. *Wilkes-Barre*, 857 F.3d at 378. To establish waiver, the employer would have to point out specific contractual language that ceded the union's statutory rights upon expiration. Id. As in the present case, nothing establishes such a waiver. The "zipper clause" in particular does not amount to a waiver. *Viejas Band of Kumeyayy Indians d/b/a Viejas Casino & Resort*, 366 NLRB No. 113, slip op. at 1 fn. 2 (2018).

3. Conclusion regarding the 2017 decrease in the Christmas bonus

Nothing in the stipulated facts shows that Respondent actually notified the Union that it intended to change the bonus payments other than that the parties were negotiating a new contract. The Union was presented with fait accompli because Respondent failed to give the Union advance notice of the change in the Christmas bonus. *Lenawee Stamping Corp.*, supra, slip op. at 9.

B. In 2018 Respondent Unilaterally Changed the Amount of the Christmas Bonus

The 2018 failure to pay the Christmas bonus as provided in the agreement also violates Section 8(a)(5) and (1) and 8(d). As General Counsel contends, this change is a mid-term modification because the collective-bargaining agreement was in effect. The Board recently summarized the law of midterm contract modification:

> Section 8(a)(5) and (1) and Section 8(d) of the Act prohibit an employer from modifying terms and conditions of employment established by a collective-bargaining agreement during the agreement's term without the union's consent. See, e.g., *Knollwood Country Club*, 365 NLRB No. 22, slip op. at 2 (2017); *Oak Cliff-Golman Baking Co*., 207 NLRB 1063, 1063–1064 (1973), enfd. mem. 505 F.2d 1302 (5th Cir. 1974), cert. denied 423 U.S. 826 (1975). When an employer defends against a midterm contract modification allegation by arguing that the contract did not prohibit the challenged action, the Board will not ordinarily find a violation if the employer's contractual interpretation has a ""sound arguable basis." *Bath Iron Works Corp*., 345 NLRB 499, 501–502 (2005), enfd. sub nom. *Bath Marine Draftsmen's Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007).[ ] It is well settled Board law that "[i]n interpreting a collective bargaining agreement to evaluate the basis of an employer's contractual defense, the Board gives controlling weight to the parties' actual intent underlying the contractual language in question" and "examines 'both the contract language itself and relevant extrinsic evidence, such as a past practice of the parties in regard to the effectuation or implementation of the contract provision in question, or the bargaining history of the provision itself.'" *Knollwood Country Club*, above, slip op. at 3 (quoting *Mining Specialists, Inc*., 314 NLRB 268, 268–269 (1994)).[ ]

Pacific Maritime Assn., 367 NLRB No. 121 (2019) [footnotes omitted]. Also see *San Juan Bautista*, supra, and *Hospital San Carlos Borromeo,* supra.

I disagree that Respondent articulates a sound arguable basis for the modification. Respondent contends that none of the extensions included any language to provide the Christmas bonus beyond 2016. (R.Br. at 6.) Article 53, Validity, specifically states the agreement's terms would continue unless otherwise provided and the specific term prevailed. As the parties agreed to an extension and the Validity section continues the terms and conditions, the Christmas bonus section survives with the entire collective-bargaining agreement. Further, the contract coverage analysis above reflects that the contract continued without a specific restriction and additionally did not waive the Union's statutory rights. Respondent does not point out anything indicating that the payments would not continue should the parties agree to a contract extension. Even if it was not a contractual condition, it certainly was a past practice, as already established.[7] I therefore find that Respondent violated the Act by reducing the Christmas bonuses due to the employees.

CONCLUSIONS OF LAW

1. Respondent Asociacion de Empleados del Estado Libre Asociado de Puerto Rico is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

[6] The Board recently adopted the contract coverage test and determined to apply it retroactively. *MV Transportation, Inc.*, 368 NLRB No. 66 (2019).

[7] Respondent's Informational Motion indicates that Respondent believes it now paid the 2018 bonus in full to employees. Even if Respondent had not withdrawn its Informational Motion, Respondent did not provide sufficient information to show that this matter is resolved or that it repudiated its conduct. Respondent would need to meet the long-standing requirements in *Passavant Memorial Area Hospital*, 237 NLRB 138, 138–139 (1978). Those requirements are a timely and unambiguous repudiation, specific to the coercive conduct and "'free from other proscribed illegal conduct.'" Id. at 138, citing *Douglas Division, The Scott & Fetzer Co*., 228 NLRB 1016 (1977). Respondent must provide adequate publication of the repudiation to the employees and no proscribed conduct on the employer's part after publication. In addition, Respondent must include assurances to employees that in the future it will not interfere with the employees' Sec.7 rights. *Passavant*, 237 NLRB at 128–139. Respondent provided no evidence of a notice posting. Respondent did not make a timely repudiation, as it waited from November 2018 until approximately October 2019 (11 months) to pay the employees. Respondent also is not free from other unlawful conduct, as I find the withholding of the required 2017 Christmas bonus is not yet remedied. Further, Respondent does not make clear whether the allegedly paid 2018 Christmas bonus was according to the terms of the 2013–2016 agreement or the implemented agreement. In short, I would have found that Respondent did not fully remediate its unlawful conduct. *A.S.V., Inc. a/k/a Terex*, 366 NLRB No. 162, slip op. 1, fn.1 (2018); *Tower Automotive, Inc*., 326 NLRB 1358 (1998).

2. Charging Party Internacional de Trabajadores de la Industria de Automoviles, Aeroespacio e Implementos Agricolas, U.A.W., Local 1850 is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times, the following individuals held positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents within the meaning of Section 2(13) of the Act:

Pablo Cresp Claudio	Executive Director
Pier A. Vargas-Luque	Acting Director, Human Resources and Labor Relations

4. Since at least March 1992, the following employees of the Respondent have been exclusively represented by the Union, based upon Section 9(a) of the Act, and constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All office, skilled office and maintenance employees and employees used to perform repairs at Respondent's building in its place of business at Hato Rey, or any other place on the Island of Puerto Rico, including Playa Santa del Caribe; excluding all professionals, executives, administrators, the executive director's driver, confidential employees, guards and supervisors as defined in the Act, the secretaries for the executive director, the secretary of the assistant executive director, the secretary for the director of finance, the secretary of the planning and budget director, the secretary of the personnel and industrial relations director, the secretary of the legal affairs office director, a secretary for each assistant to the executive director up to a maximum of four secretaries, a secretary for each division by which the executive director carries out his functions, up to a maximum of four secretaries, the auditor's secretary and the secretary of the regional services director.

5. About November 2017, Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing Christmas bonus pay and failing to follow the contractual rate established as past practice.

6. About November 2018, Respondent violation Section 8(a)(5) and (1) and 8(d) of the Act by making a mid-term modification of the collective-bargaining agreement, unilaterally changing Christmas bonus amount and failing to follow the contractual rate.

7. The above unfair labor practices affect commerce within the meaning of 2(6) and (7) of the Act.

REMEDY

Having found Respondent engaged in unfair labor practices, I shall order it to cease and desist from such conduct and to take certain affirmative action designed to effectuate the policies of the Act.

Because Respondent violated Section 8(a)(5) and (1) by changing the terms and conditions of employment of its unit employees without giving the Union an opportunity to bargain, I shall order the Respondent to rescind the unlawful unilateral changes it made, upon request from the Union. Respondent also must make unit employees whole for any loss of earnings and other benefits attributable to its unlawful unilateral changes in the 2017 and 2018 Christmas bonuses. *Viejas Band,* supra; *Hospital Santa Rosa Inc. a/k/a Clinica Santa Rosa*, 365 NLRB No. 5, slip op. at 1–2 (2017). In this regard, backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Respondent must compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 12, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143, slip op. at 1–2 (2016).[8]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended

ORDER

1. Cease and desist from

(a) Failing and refusing to bargain with Union Internacional de Trabajadores de la Industria de Automoviles, Aeroespacio e Implementos Agricolas, U.A.W., Local 1850 (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) Unilaterally changing terms and condition of employment of its unit employees, including reducing Christmas bonus pay, without first notifying the Union and giving it an opportunity to bargain.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reach, embody the understanding in a signed agreement:

> All office, skilled office and maintenance employees and employees used to perform repairs at Respondent's building in its place of business at Hato Rey, or any other place on the Island of Puerto Rico, including Playa Santa del Caribe; excluding all professionals, executives, administrators, the executive director's driver, confidential employees, guards and supervisors as defined in the Act, the secretaries for the executive director, the secretary of the assistant executive director, the secretary for the director of finance, the secretary of the planning and budget director, the secretary of the personnel and industrial relations director, the secretary of the legal affairs office director, a

[8] Compliance will determine whether Respondent met the requirements in this Remedy for the 2018 Christmas bonus, which allegedly it has paid to the employees.

secretary for each assistant to the executive director up to a maximum of four secretaries, a secretary for each division by which the executive director carries out his functions, up to a maximum of four secretaries, the auditor's secretary and the secretary of the regional services director.

(b) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit.

(c) Resume giving unit employees Christmas bonuses and maintain it in effect until an agreement is reach with the Union or a lawful impasse in negotiations occurs.

(d) Make whole employees in the above-described unit for any losses and other benefits suffered as a result of the unlawful unilateral changes in Christmas bonuses in the manner set forth in the Remedy section of the decision.

(e) Make whole unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 12, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year for each employee.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a designed by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such record if stores in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its San Juan, Puerto Rico facility copies of the attached not marked "Appendix."[9] The posting shall be in English, Spanish, and any other language that the Regional Director finds applicable. Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In additional to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if Respondent customarily communicates with employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since September 30, 2016.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 12 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated Washington, D.C., November 6, 2019

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail to bargain with Union Internacional de Trabajadores de la Industria de Automoviles, Aeroespacio e Implementos Agricolas, U.A.W., Local 1850 as the exclusive collective-bargaining representative of the employees in the following unit:

All office, skilled office and maintenance employees and employees used to perform repairs at Respondent's building in its place of business at Hato Rey, or any other place on the Island of Puerto Rico, including Playa Santa del Caribe; excluding all professionals, executives, administrators, the executive director's driver, confidential employees, guards and supervisors as defined in the Act, , the secretaries for the executive director, the secretary of the assistant executive director, the secretary for the director of finance, the secretary of the planning and budget director, the secretary of the personnel and industrial relations director, the secretary of the legal affairs office director, a secretary for each assistant to the executive director up to a maximum of four secretaries, a secretary for each division by which the executive director carries out his functions, up to a maximum of four secretaries, the auditor's secretary and the secretary of the regional services director.

WE WILL NOT unilaterally change terms and conditions of employment of our unit employees, including the Christmas bonus contained in the expired 2013–2017 collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, before implementing any changes in wages, hours or other terms and conditions of employment of bargaining unit employees, notify and, upon request, bargain with the Union as the exclusive representative of our employees in the appropriate unit.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL resume giving unit employees the Christmas bonus according to the terms of the most recent collective-bargaining agreement that expired June 30, 2017, and WE WILL maintain it in effect until an agreement has been reached with the Union or a lawful impasse in negotiations occurs.

WE WILL pay each unit employee the difference between the full Christmas bonuses due in 2017 and 2018 under the collective-bargaining agreement and the bonus amount actually paid, with interest, as set forth in the Remedy section of this decision.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 12, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year for each bargaining-unit employee.

ASOCIACION DE EMPLEADOS DEL ESTADO LIBRE ASOCIADO DE PUERTO RICO

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/12-CA-218502 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.